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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-886

THE UPJOHN COMPANY, et al.,

Petitioners

v.

THE UNITED STATES OF AMERICA, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM OF THE CHICAGO BAR ASSOCIATION AS AMICUS CURIAE

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MEMORANDUM OF THE CHICAGO BAR ASSOCIATION AS AMICUS CURIAE

This memorandum of the Chicago Bar Association is filed with the consent of all parties and in support of the petition for a writ of certiorari on the issue of the attorney-client privilege.

INTERESTS OF THE AMICUS CURIAE

The Chicago Bar Association is an association of more than 14,000 lawyers and judges who practice in the metropolitan Chicago, Illinois area. The diversity of their practices and the range of their interests in areas of concern to the profession is limited only by the parameters of modern business practice. Many of the Association's members are actively engaged in counseling and otherwise representing corporations and their employees with business

activity both within and without the State of Illinois and its contiguous neighbors. The existing uncertainty with respect to the scope of the attorney-client privilege has a substantial disruptive influence on a lawyer's ability to discharge his professional responsibility in representing and advising corporations.

STATEMENT

The facts and proceedings below are fully set forth in the petition.

QUESTION PRESENTED

Whether communications between an employee of a corporation and an attorney for the corporation, relating to the subject matter of the employee's duties and involving legal services being performed for the corporation by the attorney, both of whom treat the communication as necessary and confidential, are protected from unauthorized disclosure by the attorney-client privilege.

ARGUMENT

This case presents an opportunity for the Court to resolve a clear conflict between the circuits on a question of substantial practical application. The Sixth Circuit has now adopted the "control group" test for determining the extent of the attorney-client privilege, thus joining the Third Circuit (*In Re Grand Jury Investigation,* 599 F.2d 1224 (3rd Cir. 1979)) and perhaps the Tenth Circuit (see *Natta* v. *Hogna,* 392 F.2d 686 (10th Cir. 1968)). The "subject matter" test, on the other hand, is the law in the Seventh Circuit (*Harper & Row Publishing, Inc.* v. *Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348 (1971), *reh. denied,* 401 U.S. 950 (1971); *Sylgab Steel & Wire Corp.* v. *Moco-Gateway Corp.,* 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd,* 534 F.2d 330 (7th Cir., 1976)) and in the Eighth Circuit (*Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir., 1977) (*en banc*)).

Of the remaining six circuits, the weight of authority in the Fourth, Ninth, and District of Columbia Circuits supports use of the "subject matter" test. *Burlington Industries, Inc.* v. *Exxon Corp.,* 65 F.R.D. 26 (D.Md. 1974);*

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* This case is sometimes erroneously cited as a "control group" decision. *E.G.,* Note, *Corporate Attorney-Client Privilege—Diversified Industries, Inc.* v. *Meredith—The Modified Harper & Row Test,* 4 J.Corp.L. 226 (1978). It clearly is not, for the court expressly held that the privilege extended to intracorporate documents "which are prepared at the direction of members of the control group to aid counsel in rendering legal assistance to the corporation, at the express or implied request of counsel, and which are primarily legal in nature" (65 F.R.D. at 39), that the request to the attorney for legal advice could also be "implied" (65 F.R.D. at 37), and that the "direction" from a control group member to a lower-level corporate employee could likewise be implicit. (65 F.R.D. at 38.)

Duplan Corp. v. *Deering Milliken, Inc.*, 397 F.Supp. 1146 (D.S.C. 1974), *Perrignon* v. *Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D.Cal. 1978); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978).* The Second Circuit recently declined to resolve the conflict in *In re Grand Jury Subpoena (General Counsel, John Doe, Inc.)*, 599 F.2d 504, 511 (2nd Cir., 1979). There are no recent cases from the First Circuit, but the leading case of *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357 (D.Mass. 1950), held that communications from all corporate agents are protected. A number of federal administrative decisions have likewise adopted the "subject matter" test.** The importance of predictability in matters relating to the attorney-client privilege supports the granting of certiorari to resolve the current conflict—regardless of the result.

In addition, it is the position of the Chicago Bar Association that the issue should be resolved by adoption of the subject matter test. The purpose of the attorney-client privilege is to encourage by confidentiality full and truthful communication of the facts by the client to his attorney and candid advice by the attorney to the client. Where the client is a corporation, these purposes cannot be served by limiting the attorney-client privilege to communications between counsel and members of the "control group." Generally, it is operating employees outside of the control group who have knowledge of the facts which the attorney needs to learn. Similarly, the attorney's legal advice and instructions, to be effective, must be communicated to the corporate employees on the "firing line".

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* A contrary case from the Fourth Circuit is *Virginia Electric & Power Co.* v. *Sun Shipbuilding & D.D. Co.*, 68 F.R.D. 397 (E.D.Va. 1975). Cf. *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D.Cal. 1963).

** *Safeway Stores, Inc.*, FTC Dkt. 9053 (ALJ proc. order, June 30, 1976); *American Dental Ass'n*, FTC Dkt. 9093 (ALJ proc. order, Sept. 27, 1977); *General Motors Corp.*, FTC Dkt. 9074 (ALJ proc. order, Jan. 25, 1978).

The control group test, therefore, is an artificial restriction which cannot be justified by reason of the nature and rationale of the attorney-client privilege. Indeed, this test directly conflicts with the entire basis of the attorney-client relationship by making the attorney's fact gathering from corporate employees and his advice to corporate employees potentially available to adverse parties for use against his client.

The practical implications of the "control group" test in a business environment populated by corporations and increasingly exposed to litigation are far reaching. The most obvious and predictable result of an application of the "control group" test may well be attorneys for corporations parading to the witness stand to testify about what they learned from corporate employees in the course of their representation of the corporation.*

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* Attempts to obtain attorney's testimony or records are increasing rapidly in number, particularly in Government investigations. In addition to *Upjohn*, see, e.g., *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 152 (5th Cir. 1979); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215 (9th Cir. 1979); *In re Grand Jury Investigation (United States)*, 599 F.2d 1224 (3d Cir. 1979); *In re Grand Jury Subpoena (General Counsel, John Doe, Inc.)*, 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1973); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F.Supp. 368 (E.D.Wisc. 1979); *Matter of Grand Jury Subpoena*, 438 F.Supp. 1176 (S.D.N.Y. 1977); *In re Grand Jury Investigation (Sturgis)*, 412 F.Supp. 943 (E.D.Pa. 1976); *Matter of Grand Jury Subpoenas Served Upon Field*, 408 F.Supp. 1169 (S.D.N.Y. 1976); *In re Grand Jury Subpoena, Nov. 16, 1974*, 406 F.Supp. 381 (S.D.N.Y. 1975); *In re Rosenbaum*, 401 F.Supp. 807 (S.D.N.Y. 1975); *In re Stolar*, 397 F.Supp. 520 (S.D.N.Y. 1975).

The routine use of attorneys as witnesses against their clients is of course unseemly and directly contrary to the whole concept of the attorney-client relationship. The situation can only result in less effective legal representation for the corporation.

This result cannot be justified on the ground that it is the only feasible method for litigants to extract necessary information from corporate adversaries. The federal rules require the production of all relevant documents relating to the subject matter of the litigation. All corporate employees may be required to testify concerning their knowledge of the facts. Interrogatories pursuant to Rule 33, Federal Rules Civil Procedure, require the corporation to assemble and provide all information in the possession of its employees. Under Rule 30(b)(6), FRCP, a corporation may be required to designate a witness or witnesses who must testify to matters "known or reasonably available" to the corporation. There has been no showing that these discovery procedures are inadequate. Certainly there is no showing that the discovery process cannot function without making the attorney a witness against his client.

In a lawsuit the attorney has an obligation to determine the facts. He must therefore go where the facts are found. An antitrust case involving allegations of price fixing can not be defended without the defendant's attorney interviewing the sales personnel, nor prosecuted without the plaintiff's attorney interviewing the purchasing agents. Similarly, a product design defect case can not be defended without the attorney interviewing the design engineers, nor prosecuted without interviewing the corporate employees who either bought, serviced or operated the allegedly defective equipment. Rarely will such individuals be members of the control group.

In a "control group" jurisdiction an attorney representing a corporation can have little confidence that his efforts in assembling information from his client may not ultimately be used to his client's detriment. Certainly the attorney must have reservations about assuring his client the communications will be kept confidential. In turn the corporate employees must have reservations about what to tell the corporation's lawyer. The effect may well be longer, more expensive, less efficient litigation since the lawyers representing the corporation may be forced to temper their factual research from fear of being turned into third parties for discovery purposes.

Compliance programs and similar internal examinations cannot be conducted with confidence in their confidentiality in a "control group" jurisdiction and therefore may well be less frequently or thoroughly done. Discouraging self-policing efforts is not of benefit to the public since the practice is generally considered beneficial, and perhaps is an essential adjunct to official enforcement of laws governing corporate conduct. The increasing frequency of such programs is indicated by the numerous reported decisions involving such internal corporate investigations.* However, since the alleged violations are generally neither committed by nor known to members of the "control group," adoption of the "subject matter" test for application of the privilege is essential to the continued viability of the practice. Otherwise, as in *Upjohn,* counsel conducting such inquiries will likely become witnesses against their clients.

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* *SEC* v. *Dresser Industries, Inc.,* CCH Fed.Sec.L.Rptr. ¶ 97,172 (D.C.Cir. 1979); *United States* v. *Upjohn Co., supra; Diversified Industries* v. *Meredith, supra; In re Grand Jury Investigation (United States), supra; In re Grand Jury Subpoena (General Counsel, John Doe, Inc.), supra; In re Grand Jury Subpoena Dated July 13, 1979, supra.*

The net effect of an erosion of confidence by the corporation in the privileged nature of communications with its lawyers will be to reduce significantly the ability of the corporation to obtain the effective assistance of counsel. A corporation should not be forced to use lawyers who are unable to prepare properly. A lawyer should not be forced to represent a corporation with his head in the sand. A corporate client must trust its lawyers to learn the facts necessary to properly advise it and the lawyer must be able to give advice based on as complete knowledge as possible.

Corporate clients need full and frank legal advice as much as natural persons. Judge Medina pointed out in *A.B. Dick Co.* v. *Marr,* 95 F.Supp. 83, 102 (S.D.N.Y. 1950), *appeal dsm'd,* 197 F.2d 498 (2d Cir. 1951), *cert. denied,* 344 U.S. 878 (1952):

> "Since [the] early statements [of the purposes of the privilege], the necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients."

The rejection of the "control group" test and the adoption of the "subject matter" test will best effectuate these principles.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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